Supreme Court of the United States

OCTOBER TERM, 1955

No. 380

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLEE

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Questions Presented

1. Has there been a lack of due process and a denial of equal protection of the laws? Did not the very statute in question afford appellant an adequate remedy, which was not barred by the statute until months after his appointment as committee and the facts as well as the appropriate statutory remedy had been made known to him?

2. In any event and whether or not there was knowledge of the alleged incompetency, by one or more undesignated Town officials, may an *in rem* tax proceeding be successfully attacked under the facts of this case?

Statement of the Case

The *in rem* foreclosure proceeding was originally commenced on May 8, 1952, pursuant to Title 3 of Article 7-A of the Tax Law of the State of New York, "Foreclosure of Tax Lien by Action in Rem."

The proceeding involved the foreclosure of liens for tax arrears accruing in 1948 with respect to a number of properties, including the property which is the subject of this appeal. Under Section 165-a of the Tax Law, inclusion of all properties four years in tax arrears is mandatory and no parcel may be withdrawn except for one of the reasons specified in Section 165-a, subd. 2 (*Tax Law*, Section 165-i). The instant case does not come within any of the exceptions.

Simultaneously with the institution of the proceeding in May 1952, publication was commenced by notice of foreclosure in the Westchester Post and The Record, newspapers serving an area including the Town of Somers, within which the property in question is situated. In addition, notice of commencement of the proceeding was given to Nora Brainard by mail and by posting. All of this was in accordance with the requirements of the statute in question.

It is conceded in the appellant's brief, at page 5, that "notice in the instant case was in strict compliance with the statute."

Four months after the commencement of the proceeding, and on September 8, 1952, judgment of foreclosure was entered herein, not only as to this owner but as to the other owners who had failed to redeem their properties within the time permitted by the statute.

On October 24, 1952, a deed to the property owned by Nora Brainard was delivered to the Town of Somers and

duly recorded in the office of the Clerk of the County of Westchester, Division of Land Records. The same thing occurred in the case of other unredeemed properties.

It was not until after the foreclosure proceeding had been concluded by the entry of judgment and the deed to the property involved delivered to the Town that Nora Brainard was first committed as an incompetent. The commitment occurred nearly six months after the *in rem* proceeding had been initiated, almost two months after judgment of foreclosure had been entered and several days after the deed had been delivered. Actually, she was not officially adjudged incompetent until January 30, 1953, four months after the entry of judgment of foreclosure and three months after the delivery of the deed. The appellant was subsequently appointed and qualified as committee of Nora Brainard on February 13, 1953.

By motion returnable October 26, 1953, at a Special Term of the County Court, County of Westchester, the committee sought to open the default of Nora Brainard, vacate the judgment of foreclosure, and set aside the deed to the Town of Somers.

On December 3, 1953, the County Court denied the motion, and rendered an opinion upholding the constitutionality of the statute in question. In this opinion, the County Court also referred to the fact that the procedure adopted by the committee for Nora Brainard was contrary to statute, citing Section 165-h, subd. 7, of the Tax Law. This section of the statute provides, in substance, that no deed executed and delivered pursuant to a judgment of foreclosure *in rem* shall be set aside unless a separate action is commenced and a notice of pendency of the action is filed in the office of the proper county clerk prior to the

expiration of two years from the date of recording the deed (Tax Law, Sec. 165-h, subd. 7).

Although the committee's time within which to institute an action to set aside the deed, as prescribed by the statute, was not to expire until October 24, 1954—or more than 10 months after the County Court's decision—nevertheless, the committee failed to institute such an action. Instead, he took successive appeals to the Appellate Division of the Supreme Court and to the Court of Appeals of the State of New York. Upon both appeals, the denial of the committee's motion to open the default was upheld.

Argument

I

THE COMMITTEE MAY NOT BE HEARD TO COMPLAIN ABOUT AN ALLEGED FORFEITURE, A LACK OF DUE PROCESS OR A DENIAL OF EQUAL PROTECTION OF THE LAWS. THE SUBJECT STATUTE AFFORDED TO HIM A REMEDY, OF WHICH HE FAILED AND REFUSED TO AVAIL HIMSELF, EVEN AFTER HIS ATTENTION HAD BEEN DIRECTED TO THE FACTS AND APPROPRIATE STATUTORY REMEDY.

The opinion of the County Court, rendered in December 1953, gave notice to the incompetent's committee, the appellant, that the procedure adopted by the committee was improper, in that Section 165-h, subd. 7, of the Tax Law of the State of New York required the institution of a separate action to set aside the deed and the filing of a notice of pendency of such action (R. 12-13). The committee had improperly proceeded by motion in the *in rem* action instead of by separate action and filing a *lis pendens*, as required by the Statute.

The committee had two years from the delivery of the deed, or until October 24, 1954, to institute the appropriate action (Tax Law, Section 165-h, subd. 7, printed at page 32 of appellant's brief). When apprised of the proper procedure by the opinion of the County Court in December 1953, the committee still had more than ten months to comply. Nevertheless, the committee failed and refused to comply with the statute.

The incompetent's committee may not now be heard to complain of lack of due process and denial of equal protection, in view of his own failure to comply with the statutory provision, even after it had been directly called to his attention by the County Court.

Moreover, under these circumstances, the committee cannot very well urge that there has been a forfeiture. The vesting of title was not "absolute and beyond dispute"—as appellant contends at page 9 of this brief—until long after the committee had been appointed, had knowledge of all of the facts and had his attention directed to the proper statutory procedure.

Appellant in his reply to the previous motion to dismiss herein, cited the case of *Nelson* v. *City of New York*, 283 A. D. 722, 127 N. Y. S. (2d) 854, in support of his contention that the procedure by motion—instead of by separate action and *lis pendens*, as provided in *Tax Law*, Sec. 165-h, subd. 7—was proper. That case is not in point for it involved an *in rem* proceeding under the *Administrative Code of the City of New York*. When that decision was rendered, there was no statutory provision in any way similar to Tax Law, Sec. 165-h, subd. 7, applicable to the City of New York.

In the instant case, there has been no lack of due process or denial of equal protection of the laws.

II.

REGARDLESS OF THE KNOWLEDGE OR LACK OF KNOWLEDGE, ON THE PART OF ONE OR MORE OF THE TOWN'S OFFICIALS, OF THE ALLEGED INCOMPETENCY, AT THE TIME OF OR PRIOR TO THE DELIVERY OF THE DEED OR INSTITUTION OF THE *IN REM* PROCEEDING, THE JUDGMENT OF FORECLOSURE AND THE DEED MAY NOT BE SUCCESSFULLY ATTACKED.

The case of *Levy* v. *Newman*, 130 N. Y. 11, involved infants who were not represented by a guardian. There, the Court of Appeals said, at pages 12, 13 and 14:

> "The adults and infants were personally served with notice of the sale, but failed to redeem within the time prescribed by statute. Neither of the infants had a general guardian, and the defendant insists that their right of redemption has not been cut off."
>
> * * *
>
> "The right to redeem lands sold to enforce the collection of taxes assessed against it, is purely statutory, and statutes providing the procedure for assessing and collecting taxes for the sale of land for their non-payment, and for the redemption of lands sold are applicable to infants and persons under disabilities, unless they are excepted from their operation. (*Metz* v. *Hipps*, 96 Penn. St. 15; *Smith* v. *Macon*, 20 Ark. 17; 2 Black Tax Titles (5th ed.) § 713; Cooley Tax. (2d ed.) 533, 534; Burroughs Tax. 362; Ang. Lim. (6th ed.) § 184.)
>
> "It is a general rule that statutes limiting the time in which, and prescribing the procedure by which, rights shall be enforced, are applicable to persons under disabilities, unless expressly excepted. (*Bucklin* v. *Ford*, 5 Barb. 393; *Bank of the State of Alabama* v. *Dalton*, 9 How. (U. S.) 522; *The Sam*

Slick, 2 Curtis C. C. 480; *U. S.* v. *Maillard*, 4 Ben. 459; *Howell* v. *Hair*, 15 Ala. 194; Ang. Lim. (6th ed.) § 194.)"

Following that holding the Court of Appeals of the State of New York, in the case of *Johnson* v. *Smith*, 297 N. Y. 165, held, at page 171:

"Once a default occurs—and the other statutory conditions are met—the county treasurer must obey the law's mandate and sell the property no matter by whom owned—whether by incompetent, infant or trustee or receiver. See, e.g., *Levy* v. *Newman*, 130 N. Y. 11, 28 N. E. 660; *County of Nassau* v. *Day*, 266 App. Div. 738, 41 N. Y. S. 2d 155, affirmed 291 N. Y. 732, 52 N. E. 2d 956; *Bonded Municipal Corp.* v. *Carodix Corp.*, 266 App. Div. 737, 41 N. Y. S. 2d 454, affirmed 291 N. Y. 733, 52 N. E. 2d 956."

If the law were otherwise, each tax collecting official would become the arbiter of the competency or incompetency of each taxpayer whose name or property might appear on a tax delinquency list. At the peril of the possible future invalidation of title to real property, the public official would have to determine when eccentricity crossed the borderline into insanity or incompetency and required the appointment of a guardian for the taxpayer—although even medical experts have been known to differ on such a question. If such an unwarranted and unreasonable burden should be placed upon public officials, it is readily apparent that chaos and uncertainty would result in those cases where title to real property was derived through *in rem* tax proceedings.

The Tax Law does not except incompetents from its provisions but, to the contrary, expressly provides that they

shall be barred and forever foreclosed, in the following language (Tax Law, Section 165-h, subd. 6):

> "Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such land and all persons, including the State of New York, infants, incompetents, absentees and non-residents who may have had any rights, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption."

The "same strict rules" which apply to the ordinary taxpayer in the case of redemption, also apply to infants and other persons under disability.

Cooley's Law of Taxation, 4th Ed. Vol. 4 Sec. 1563, p. 3071.

Tax foreclosures are *in rem* and not against the person of the owner of the property.

Ontario Land Co. v. *Yordy*, 212 U. S. 152, 158.

The process of taxing real estate does not require the same kind of notice as is required in an action at law, or even in proceedings for the taking of private property under the power of eminent domain. These are proceedings which have regard to the land itself, rather than to the owners of the land. Constructive notice is good as against the world.

Leigh v. *Green*, 193 U. S. 79, 89, 90, 91.

It is the land that stands accountable to the demands of the state, and the owners are charged with the laws affecting

it and the manner by which those demands may be enforced. A statute providing for constructive service does not violate the due process clause of the United States Constitution or deny such owners the equal protection of the laws.

Ballard v. *Hunter*, 204 U. S. 241, 254, 255.

The right of redemption is exclusively statutory and can only be claimed in the cases and circumstances prescribed in the statute. Courts cannot extend the time or make any exceptions not made by statute. Redemption cannot be had in equity, except as it may be permitted by statute, and then only under such conditions as the statute may attach.

Keely v. *Sanders*, 99 U. S. 441, 445, 446;
Bank of the State of Alabama v. *Dalton*, 9 How. 522;
Levy v. *Newman*, 130 N. Y. 11, 13, 14;
Johnson v. *Smith*, 297 N. Y. 165, 171.

The payment of taxes must necessarily be enforced by summary and stringent means, and to do this successfully other instrumentalities and modes of procedure are necessary than those which belong to the courts.

State Railroad Tax Cases, 92 U. S. 575, 614;
Murray's Lessee v. *Hoboken Land & Improvement Co.* 18 How. 272, 281, 282.

The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizen have always been regarded as administrative and not judicial in their character. Such proceedings have from necessity been exercised by governments, by summary methods and procedure. These methods were in exercise

and existence long before the adoption of the Constitution and have never been supposed to be affected thereby.

McMahon v. *Palmer*, 102 N. Y. 176, 189, aff'd 133 U. S. 660

If a judicial agency is used for some part of the process of collection of taxes, it is not because required, but convenient. It is entirely a matter for legislative determination. The tax collecting function is still administrative and remains such even though judicial forms are applied in the process.

Phillips v. *Commission*, 283 U. S. 589; *Protestant Episcopal School* v. *Davis*, 31 N. Y. 574.

In his brief, appellant quotes extensively from *Mullane* v. *Central Hanover Trust Company*, 339 U. S. 306. That case did not involve a tax statute and has no bearing whatever on the question presented in this case.

The constitutionality of the very statute attacked in this appeal was presented to this Court in two prior actions and certiorari was denied in each case.

City of New Rochelle v. *Echo Bay Waterfront Corp.*, 268 A. D. 182, 49 N. Y. S. 2d 673, aff'd 294 N. Y. 678, cert. den. 326 U. S. 720;

Lynbrook Gardens v. *Ullman*, 291 N. Y. 472, cert. den. 322 U. S. 742.

IN CONCLUSION

There has been no lack of due process or denial of equal protection of the laws and, therefore, the judgment appealed from should be in all respects affirmed.

Dated, February 29, 1956

Respectfully submitted,

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